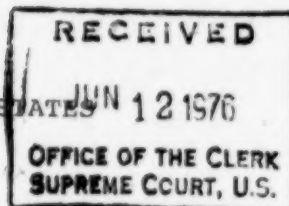


IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975



NO: 75-6909

GARY MANESS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Offender Rehabilitation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1975

NO. **75-6309**

GARY MANESS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Offender Rehabilitation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, GARY MANESS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on the 18th day of March, 1976.

OPINION BELOW

The full opinion of the United States Court of Appeals for the Fifth Circuit appears in the Appendix hereto. The reported opinion appears at 512 F.2d 88.

JURISDICTION

The judgment and opinion of the United States Court of Appeals was entered on April 25, 1975. A suggestion for rehearing en banc was timely filed, (App.) and was granted on September 2, 1975. (App.). On March 18, 1976, the court of appeals, sitting en banc, voted 10:5 to vacate its order granting rehearing en banc. 512 F.2d 1381 (App.).

This petition for a writ of certiorari is timely filed within ninety days of the disposition of the suggestion for rehearing en banc. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE INSTANT DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, WHICH AFFIRMS A DENIAL OF FEDERAL HABEAS CORPUS RELIEF WHERE THE STATE TRIAL JUDGE APPLIED A STATE EVIDENTIARY RULE REGARDING THE IMPEACHMENT OF ONE'S OWN WITNESS TO PRECLUDE THE PETITIONER FROM PRESENTING EVIDENCE WHICH WOULD HAVE TENDED TO ESTABLISH HIS DEFENSE, CONTROVERT THE ALIBI TESTIMONY OF THE ONLY OTHER SUSPECT, AND IMPEACH THE OTHER SUSPECT'S CREDIBILITY, THUS RENDERING THE PETITIONER'S DEFENSE FAR LESS PERSUASIVE AND DENYING THE PETITIONER DUE PROCESS OF LAW, IS ERRONEOUS AND IS IN REAL CONFLICT WITH THE DECISION BY THIS COURT IN CHAMBERS v. MISSISSIPPI, 410 U.S. 284 (1973) AND THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN UNITED STATES v. TORRES, 477 F.2d 924 (1973).

STATEMENT OF THE CASE

This case arises from the petitioner's trial on charges that he was criminally responsible for the death of his and his wife, Linda's, infant daughter. The infant, Misty Maness, died in April of 1971, the victim of the "battered child syndrome." The police conducted an investigation of both petitioner and his wife, regarding the death of the child.

On June 8, 1971, an information was filed in the Criminal Court of Record, Dade County, Florida, charging the petitioner with manslaughter. (Tr. 406). Petitioner interposed a plea of not guilty, and a jury trial was had on October 4th and 5th, 1971.

At his trial, the petitioner sought to establish that he was innocent of the charges and that there was reason to believe that his wife, Linda Maness, the only other suspect to the crime, had committed the offense.

The petitioner testified at his trial that he had made an inculpatory extra-judicial statement to the police to protect his wife, because, at the time, he thought she was pregnant. Petitioner further testified that the statement he had previously given was one which he had agreed upon with his wife prior to their interrogation by the police in order to protect her from arrest and was not, in fact, the true version of what had happened. (Tr. 291-297, 250, 310-311).

The state did not charge Linda and at the petitioner's trial, failed to call her as a witness in the state's case in chief. Petitioner's trial counsel was thus forced to call Linda as a witness, and immediately asked the court to declare the witness an adverse and hostile witness so that she could be cross-examined. The court refused to permit the defense to treat Linda as an adverse and hostile witness. Linda testified consistently with the state's position, and defense counsel's attempts to impeach her testimony, in

which she, inter alia, denied striking the baby, were prohibited by the state trial court on the grounds that the defense would not be permitted to impeach its own witness (The Voucher Rule).¹ (Tr. 245-270) Moreover, the defense was precluded from introducing inculpatory and impeaching letters written by Linda Maness to Gary while he was in jail awaiting trial. (Tr. 252-260). These letters in effect tended to exculpate Gary Maness in that they stated, inter alia, that Gary had not done the act with which he was charged. (App.)².

Later in the petitioner's state court trial, the defense counsel called Dana Maness, petitioner's sister-in-law, as a witness. (Tr. 322) The state objected to her testifying on the grounds that her testimony would tend to impeach Linda, whom the state argued was a defense witness and therefore could not be impeached by the defense pursuant to the voucher rule. This objection was sustained by the trial court. (Tr. 323) Defense counsel then proffered to the court that Dana Maness would testify that while in Tennessee, Linda had had a conversation with her in which she told Dana that Gary Maness did not touch the baby and that she did not know what happened, but that Gary Maness did not do what he had been charged with. (Tr. 324) The proffer of Dana's testimony also included an admission by Linda that she had never left her home on the afternoon the baby was fatally injured. This would have contradicted Linda's in court testimony (Tr 250) and statements to the police, and supported petitioner's version of the case. The state trial court ruled that the witness would be precluded from testifying in the manner proffered since this would violate the rule of evidence which prevents a party from

¹The voucher rule applied by the Florida court is identical to the rule condemned in Chambers v. Mississippi, see , infra.

²These letters were attached to a motion for leave to supplement the record pursuant to Federal Rule of Appellate Procedure 10(c) filed in the Fifth Circuit simultaneously with the submission of the petition for rehearing and suggestion for rehearing en banc. See page , infra and Appendix .

impeaching his own witness. (Tr. 323-324)

Defense counsel also attempted to call Ruth Maness, mother of the defendant, but the state objected to her testimony (as proffered) on the grounds that it tended to impeach Linda, a defense witness and therefore was improper under the state voucher rule. The trial court sustained the prosecution's objection. (Tr. 325) The proffer concerned certain bloody baby blankets which were found at the Maness residence while Misty was in the hospital. Linda had testified before the jury that the source of this blood was the baby's cracked gum. (Tr. 266-267) The proffer of Ruth's testimony indicated that Linda had told Ruth that the bloody baby blanket was a result of Linda's menstrual period. (Tr. 325) This testimony was excluded by application of the voucher rule. (Tr. 325)

The petitioner took the stand to testify in his own defense. His testimony directly contradicted Linda's on a number of crucial points.

The petitioner testified that Linda was lying when she stated that she had left the house on the afternoon the injuries were inflicted. (Tr. 310-312) The petitioner admitted that he had lied when he had stated to the police that this was the case, but that he had done so for the purpose of protecting his wife. (Tr. 294, 295, 305, 311, 312, 317) He was protecting his wife because she had told him that she was pregnant, and the police had told him that if he did not confess there was a good chance of his wife going to jail. (Tr. 292, 305, 317, 320)

On cross-examination by the state, Linda had testified that she had seen the petitioner slap the baby in the face on the day in question. (Tr. 270) The petitioner testified that his wife was lying and that he did not at any time strike the baby in the face. (Tr. 277, 303, 304, 307)

Linda described an incident in which the petitioner had slapped the baby on the leg, and when Linda tried to

pick up the baby, the petitioner had slapped Linda. (Tr. 271-272, 274) The petitioner testified that his wife was lying and that it was his wife who had slapped the baby on that occasion. He told her to stop; she said she did not have to, that it was her baby, and the petitioner then slapped his wife. (Tr. 286)

Linda testified that the petitioner had told her that he was not ready to be married and that she should take the baby and go back to her parents. (Tr. 265, 272-273) The petitioner testified that he did not feel unduly burdened by the marriage, and that he had not told his wife to leave. (Tr. 297-299) The petitioner testified that it was his wife who had been unhappy and wanted a divorce. (Tr. 297, 309)

Defense counsel attempted to inquire whether Linda had filed for a divorce against the petitioner. The trial judge sustained the State's objection on relevancy grounds. (Tr. 262)

With regard to how the baby had sustained its injuries, the petitioner testified that he knew only what his wife had told him in this regard, and that he had always been truthful with the attending physicians to the best of his knowledge and, according to what Linda had told him, the baby had fallen down, or gotten caught in its crib, or hit itself in the head with its bottle. (Tr. 313-315, 318-319)

The defense theory of the case, as limited by the trial court's repeated exclusions of evidence based on the state voucher rule went to the jury, and on October 5th, 1971, the jury returned a verdict of guilty. The court adjudged the petitioner guilty and sentenced him to be confined in the state penitentiary for a period of twenty years. (Tr. 440) (which sentence is currently being served).

Petitioner timely appealed from the judgment of conviction and sentence to the District Court of Appeal of Florida, Third District. (Tr. 441) The judgment of the trial court was affirmed. Maness v. State, 262 So.2d 716 (Fla. 3d Dist. 1972). (App.).

In that appeal, the petitioner claimed that the

trial court had deprived him of the right to offer testimony and present a defense as guaranteed by the due process clause of the Fourteenth Amendment. The District Court of Appeal rejected this argument and reaffirmed the voucher rule by holding: "An attempt by the defendant to impeach his own witness was properly denied by the court, on objection by the State." *Id.* at 717.

On October 23, 1973, a petition for a writ of habeas corpus was filed in the United States District Court for the Southern District of Florida. (App.) The petitioner claimed that the exclusion of defense evidence by the state trial judge denied the petitioner due process of law and contravened principles enunciated by the Supreme Court of the United States in Chambers v. Mississippi, 410 U.S. 284 (1973).

More specifically, the petition for habeas corpus relief alleged a deprivation of the petitioner's fundamental constitutional rights to due process of law as a result of:

1. The petitioner was precluded from cross-examination of Linda Maness, the only other suspect to the crime, regarding her knowledge that Gary Maness was innocent, and prevented the Defendant from showing that Linda Maness' in-court testimony differed greatly from her extra-judicial statements regarding the death of the baby. (Tr. 245-270)
2. The petitioner was precluded from impeaching Linda Maness by showing that she had written letters to Gary which contained, *inter alia*, statements to the effect that Gary was innocent and that she was sorry for what she had done to him. (Tr. 252-260)
3. The petitioner was precluded from calling Dana Maness who would have testified that Linda Maness had made extra-judicial statements to her to the effect that the Defendant was innocent of the charges against him. (Tr. 322-325)
4. The petitioner was precluded from calling Ruth Maness who would have testified that Linda Maness' in-court statement significantly differed from her extra-judicial statements. (Tr. 336-337)

The habeas corpus petition averred that

Defense counsel had asked the Court for permission to treat Linda Maness as an

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adverse witness so that it would impeach her statement regarding the commission of the offense with which the defendant was charged. Defense counsel was trying to show that Linda Maness and not the petitioner had battered the child and caused the child's death. He was precluded from doing so by the trial Court's ruling regarding the impeachment of one's own witness. (R. 6)

The district judge made no finding of fact regarding the role of the petitioner's wife in the trial or the nature of her testimony, except that the defense moved to call her as an adverse or hostile witness and that this motion was denied. (R. 36) The petition alleged that upon taking the stand, "Linda Maness testified consistently with the State's position". (R. 2) The respondent confirmed this allegation:

It was Linda Maness's testimony that on the day in question the victim was in good health throughout the day until Mrs. Maness left about 4:00 or 4:15 p.m. When she returned she found the child in the battered condition in which she died. (R. 250) She further stated she did not know how the child was injured. (R. 252) (R. 24)

The district court found that the petitioner had adequately exhausted his state remedies, and so decided the case on the merits. (R. 38) It also determined that Chambers v. Mississippi, *supra*, had announced no new principles of constitutional law and that Florida's assertion that petitioner's claim presented a question regarding the retroactive application of Chambers was incorrect. (R. 37-38)

On December 18, 1973, the district court entered its order of dismissal of the habeas corpus petition. (R. 34-42) The habeas judge held that the evidentiary rulings of the state court "did not have the effect of thwarting any defense theory the petitioner sought to assert." (R. 41) This conclusion was reached notwithstanding the district court's findings of fact:

Petitioner then sought to introduce letters written by his wife to him in which she allegedly admitted that she was pregnant; that she knew petitioner had not done it; that she felt guilty about what she was doing to petitioner; and that she was not at the store

during the afternoon of April 14, 1971. These letters were excluded by the trial judge because they were offered by the petitioner to impeach or discredit his own witness.

Finally petitioner attempted to present the testimony of his sister-in-law, Dana Maness, regarding admissions made to her by petitioner's wife that petitioner had not touched the baby; and that she did not know what had really happened; and that she had never left her home during the afternoon hours of April 14, 1971. (R. 63) (Emphasis added)

On January 9, 1974, petitioner filed a motion for reconsideration or alternatively for a certificate of probable cause and memorandum in support thereof. (R. 43-75) On January 14, 1974, the United States District Judge entered his order denying the motion for reconsideration and granting a certificate of probable cause to appeal and leave to proceed in forma pauperis.

On January 18, 1974, the petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit.

On appeal to the Fifth Circuit the petitioner argued:

THE DISTRICT COURT ERRED IN DENYING HABEAS CORPUS RELIEF WHERE THE STATE TRIAL JUDGE APPLIED A STATE EVIDENTIARY RULE REGARDING THE IMPEACHMENT OF ONE'S OWN WITNESS TO PRECLUDE THE PETITIONER FROM PRESENTING EVIDENCE WHICH WOULD HAVE TENDED TO ESTABLISH HIS DEFENSE, CONTROVERT THE ALIBI TESTIMONY OF THE ONLY OTHER SUSPECT, AND IMPEACH THE OTHER SUSPECT'S CREDIBILITY, THUS RENDERING THE PETITIONER'S DEFENSE FAR LESS PERSUASIVE AND DENYING THE PETITIONER DUE PROCESS OF LAW.

The factual parallels between the instant case and this Court's ruling in Chambers v. Mississippi, 410 U.S. 284 (1973), were extensively argued both in petitioner's brief and on oral argument. Petitioner also relied on the ruling of the Ninth Circuit in United States v. Torres, 477 F.2d 924 (9th Cir. 1973). Torres, relying upon the rule announced by this Court in Chambers, reversed a conviction and held, upon facts much less devastating to the defense theory than those which exist in the present case or in Chambers, that:

The rule against impeaching a party's own witness (is) a pointless limitation on the search for truth. United States v. Torres, supra at 925.

The Fifth Circuit, in a split decision, rejected petitioner's arguments, notwithstanding the majority's unequivocal findings that

The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. Maness v. Wainwright, 512 F.2d at 92.

It would certainly have furthered the 'integrity of the fact-finding process.' Chambers, supra at 925, 93 S.Ct. at 1046, if Maness had been allowed to cross-examine her [Linda]. 512 F.2d at 91.

The majority, in essence, based its affirmance on the following:

a. Chambers is applicable, but "we cannot read Chambers as broadly as Maness would have us. . . ." 512 F.2d at 91.

b. Although Maness' defense theory was restricted by operation of the state voucher rule, the applications of the rule did not amount to the degree of interference which would constitute a denial of Maness' right to a fundamentally fair trial. 512 F.2d at 89, 92.

c. Maness' explanation as to how the baby was injured was unrealistic. The opinion finds:

"Petitioner offered the rather unrealistic explanation that the baby may have fallen down, gotten caught in her crib, or hit herself in the head with her bottle." 512 F.2d at 92.

d. With regard to the proffered but excluded testimony of Dana and Ruth Maness (which contradicted Linda's in court testimony and statements to the police), the court did "not find in a close relative's testimony the 'persuasive assurances of trustworthiness' cited by the court in Chambers. . . ." 512 F.2d at 92.

e. Linda's letters, which were excluded by the state trial judge, were not made part of the record and "[i]t is therefore impossible to evaluate with any assurance the possible impact they may have had on Maness' defense." 512 F.2d at 91.

In dramatic contrast to the findings in the majority opinion, Judge Clark, dissenting, could perceive no distinction between the proof wrongfully excluded in Chambers and that refused in the case at bar. 512 F.2d at 93.

Judge Clark found that the excluded evidence corroborated Maness' recantation of his confession, that the evidence was excluded as a direct result of the application of Florida's voucher

rule, that the exclusion of this evidence violated due process of law, and that, at a minimum, the case should have been remanded for a determination of the authenticity and content of Linda's letters.

On or about May 21, 1975, petitioner filed his Petition for Rehearing and Suggestion for Rehearing en Banc. (App.)

The bases for the petition were arguments that:

1) The majority's narrow interpretation of the holding of Chambers was erroneous; especially in light of its finding that Chambers was applicable to the case.

2) Even accepting a narrow interpretation of the Chambers holding, the state trial judge's repeated exclusions of evidence based on the Florida Voucher Rule interfered with Maness' ability to present his defense to such a degree that his constitutional guarantee of due process of law was denied him.

3) The majority's finding that Maness' in-court explanation of how the baby sustained injuries was improbable, overlooked Maness' testimony that he based this explanation on what "Linda told me. . . [w]hen I asked her how she [the baby] got the bruises." (TR 317-318). As explained, this version of the baby's injury is entirely consistent with Maness' version of the events of the day in question and with the thrust of Maness' defense.

4) The majority's repeated references to the fact that Linda's letters were not part of the record on appeal, and, that they therefore could not be evaluated by the court to determine what effect their exclusion would have had on the defense, were irrelevant and improper. The habeas petition contained sworn allegations as to the letters' contents. The State of Florida did not controvert the statements. The habeas judge, in its order of dismissal of December 18, 1973 (App.), made findings as to the nature and contents of Linda's letters, which findings were not attacked by the respondent at any time. Moreover, as will be established hereinafter, simultaneously with the filing of the petition for rehearing, petitioner filed a motion for leave to supplement record pursuant to Rule 10(c), which contained synopses

of the contents of the letters, and had attached thereto copies of Linda's most damning letters.

5) The majority's finding that the excluded testimony of Dana and Ruth Maness lacked the "reliability and trustworthiness" which characterized the "hearsay" improperly excluded in Chambers was erroneous and irrelevant. The proffered testimony was impeachment evidence (cf Linda's in-court testimony) and therefore was not "hearsay" as the majority erroneously concluded. Rather, the impeachment evidence was a category of non-hearsay, in that it was not coming in for its truth. Also, and alternatively, the fact that such evidence cross-corroborates the other excluded evidence and Maness' testimony, rendered its exclusion even more prejudicial.

Petitioner argued that the case involved a matter of exceptional importance, warranting a rehearing en banc. (App.) In that regard, the petitioner argued that the Maness case was the first enunciation of the Fifth Circuit directly interpreting Chambers and that the majority had erred in reaching a result opposite that reached by this Court in Chambers. Also, petitioner argued that the Maness decision was irreconcilable not only with Chambers, but also with the Ninth Circuit's recent case applying Chambers, United States v. Torres, 477 F.2d 922 (9th Cir. 1973).

As previously mentioned, simultaneously with the filing of the petition for rehearing, petitioner filed a motion for leave to supplement record pursuant to Rule 10(c). (App.). Attached to the motion were copies of many of Linda's letters which had been excluded by the state trial judge. The motion pointed out that the majority's numerous references to the unavailability of the letters were the first time the apparent lack of the letters was relied upon to deny Maness habeas corpus relief. Moreover, the motion set forth the repeated efforts of petitioner to admit the letters in his state court trial (see Tr. 252-260). This motion was denied by the Fifth Circuit on June 11, 1975, without opinion.

In response to the petition for rehearing and suggestion of the appropriateness of a rehearing en banc, a majority of the

judges of the Fifth Circuit voted in favor of granting a rehearing of the cause en banc on briefs without oral argument. 519 F.2d 1085. (App.). In accordance with that order, the parties filed supplemental briefs. (App.).

On March 18, 1976, the court entered two orders. The first denied the petition for rehearing. (App.). The second vacated the September 2, 1975, order granting rehearing en banc. (App.). From the order denying rehearing, Judge Clark dissented: [T]he majority has misapplied the principles of Chambers v. Mississippi to the facts of this bizarre and tragic case." (App.) 528 F.2d 1383.

The order denying rehearing en banc was signed by nine circuit judges; five dissented, and one concurred in part.

The five dissenters and Chief Judge Brown, concurring with the dissent, opined that the en banc majority had decided the Maness case on the basis of Chambers, but had reached the wrong result. The en banc dissenters observed that the majority failed to present a version of the facts which contradicted the account set forth in Judge Clark's dissent, which dissent was characterized as "unanswerable." 512 F.2d at 1382 (5th Cir. 1976). The en banc dissenters acknowledged that Maness' defense theory was that there was reason to believe that Linda, and not he, was the perpetrator of the crime, and that all evidence excluded tended to cross-corroborate this defense. The dissenters concluded that Chambers requires that a defendant be afforded a fair opportunity to defend, that the majority opinion is clearly inconsistent with Chambers, and that Chambers can only be distinguished "in immaterial factual details." 512 F.2d at 1382 (5th Cir. 1976).

The instant petition for a writ of certiorari timely followed the March 18, 1976 orders.

REASONS FOR GRANTING THE WRIT

The Decision Below Is In Real Conflict With Decisions Of This Court And The Ninth Circuit Which Hold That The Voucher Rule Can Not,

Consistent With Due Process, Be Applied So As To Interfere With A Criminal Defendant's Fair Opportunity To Present A Defense.

As will be developed with specificity hereinafter, certiorari review is necessary because the opinion as to which review is sought directly conflicts with the holding of this Court in Chambers v. Mississippi, and is inconsistent with the opinion of the Ninth Circuit in United States v. Torres, both of which cases involve the same points of law and fact as are involved in the instant case. In order to reconcile this conflict, and to insure uniformity and eliminate confusion among the circuits, it is essential that this Court issue its writ of certiorari.

The majority opinion as to which review is sought states:

The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. 512 F.2d at 92.

The majority opinion thus concedes that Gary Maness' defense was adversely affected by the state trial court's exclusion of evidence based on the Florida Voucher Rule. The opinion goes on, however, to affirm the denial of habeas corpus relief because, in the opinion of the majority, the degree of the state trial court's interference with the petitioner's efforts to establish a defense did not violate Maness' right to a fair trial. 512 F.2d at 92. In reaching this decision, it is respectfully submitted that the opinion misinterprets and misapplies the controlling facts and law of Chambers v. Mississippi. In Chambers, this Court reversed a state murder conviction. The reversal was based in part on the principle that a state's voucher rule, could not, consistent with due process, be applied so as to interfere with a criminal defendant's fair opportunity to present a defense. In Chambers, this Court said in no uncertain terms:

Whatever validity the "voucher" rule may once have enjoyed, and apart from whatever usefulness

it retains today in the civil trial process, it bears little relationship to the realities of the criminal process. Chambers v. Mississippi, 410 U.S. 296 (1973).

Here as in Chambers, the thrust of the defense is that some one other than the petitioner is guilty of the offense. In Chambers, the defendant was permitted to call one Gable McDonald when the state failed to do so in the state's case in chief. When McDonald was on the stand his written confession was admitted into evidence. On cross-examination by the state, McDonald repudiated the confession on the grounds that it was part of a scheme to free Chambers so that a false arrest suit could be brought in which McDonald would participate in the proceeds. After McDonald's repudiation the defense then attempted to cross-examine McDonald as to his repudiation. Thus, in Chambers, the defense was permitted to introduce into evidence the written extra-judicial statement by the witness (something not permitted in the case at bar), but was thwarted only in the cross-examination of the witness as to his repudiation of that extra-judicial statement.

In contrast, in Maness, Linda's letters were not permitted into evidence, notwithstanding the defense's repeated efforts to have the letters admitted. (Tr. 253-260) Thus, the instant opinion's judgment that "Chambers' trial was a palpable miscarriage of justice" (512 F.2d at 91) but that here "the Voucher Rule's application did not deprive Maness of a trial in accord with notions of fundamental fairness embodied in the due process clause" (512 F.2d at 92) is patently erroneous.

The defense was permitted to go much further in Chambers than the defense in Maness was permitted to go, and the Supreme Court reversed Chambers' conviction because of the application of the Voucher Rule in precluding the cross-examination of McDonald as to his repudiation of the confession. Maness was not even permitted to introduce into evidence Linda's extra-judicial letters, nor was he permitted to cross-examine her as to the contents of those letters. The

written confession of McDonald in Chambers is parallel to Linda's letters in Maness. The confession in Chambers was introduced into evidence, the letters in Maness were not. That and that alone is sufficient to establish that the instant case manifests a greater deprivation of constitutional rights than that which was present in Chambers. The opinion sub judice suggests that the deprivation in the Maness case was of a lesser degree than that in Chambers. This conclusion can only result from a misapplication of the controlling facts of the Chambers decision.

The Maness opinion is a case of first impression in the United States Court of Appeals for the Fifth Circuit interpreting Chambers v. Mississippi. Although the facts and points of law in the two cases are similar, the Fifth Circuit reached a result diametrically opposed to that reached by this Court in Chambers. Moreover, at least one other Circuit, in interpreting Chambers, has reached a result contrary to that reached by the Fifth Circuit in the instant case. See United States v. Torres, 477 F.2d 922 (9th Cir. 1973).

In United States v. Torres, supra, the Ninth Circuit applied the Chambers rationale and reversed a conviction where the trial judge had precluded the defense from impeaching its own witness. Torres, who had been charged with importing and possessing cocaine and heroin, called as a defense witness one Anselmo Lebron, the man who had been in the back seat of Torres' car at the time Torres was apprehended. Torres had testified that his jacket, in which the drugs were found, had been in the back seat of the car adjacent to Lebron. Lebron's testimony at trial was that Torres had worn the jacket during the entire trip. Torres then attempted to impeach Lebron's testimony by introducing Lebron's prior conviction for selling heroin. The trial judge refused to permit Torres to do this on the grounds that, absent surprise,

one may not impeach his own witness. The Ninth Circuit, citing Chambers, reversed the conviction and held

It was crucial to Torres' defense to show that Lebron's testimony was false and that Lebron had reason to lie. It was in Lebron's interest to lie to save himself from prosecution and from revocation of his probation for the prior conviction. If the court had permitted Torres to introduce Lebron's record, the jury may have disbelieved Lebron's testimony and acquitted Torres. The rule against impeaching a parties' own witness [is] a pointless limitation on the search for truth. United States v. Torres, 477 F.2d at 925.

Thus, because the Maness opinion reaches a result diametrically opposed to that reached by this Court in Chambers' and inconsistent with the opinion in Torres involving the same question of law and fact, this case, especially in light of the well-reasoned dissent of Judge Clark, is one of exceptional importance warranting certiorari review by this Court.

Moreover, the entire thrust of the defense in Maness' case was predicated upon the establishment of a reasonable doubt as to Gary's guilt in light of Linda's letters. The opinion states:

Unfortunately, these letters are not part of the record on appeal and it is therefore impossible to evaluate with any assurance the possible impact they may have had on Maness' defense. 512 F.2d at 91.

In three or four other parts of the decision as to which review is sought, the majority points out that Linda's letters are not before them and therefore cannot be examined as part of an analysis of whether their preclusion significantly affected Maness' defense. However, sworn allegations as to the contents of the letters were made in the habeas corpus petition. These statements were not controverted by the response of the Attorney General of the State of Florida in the District Court. Moreover, the District Court made specific findings as to the contents of the letters. Because the habeas judge made findings as to the nature and content of Linda's letters, which findings were supported by the record, it was highly improper for the Fifth Circuit to deny Gary Maness relief predicated upon the perceived unavailability of the letters. As is pointed out in Judge Clark's dissenting opinion, "at a

minimum, it seems to me that this case must be remanded for a determination of the authenticity and content of Linda's letters". 512 F.2d at 93. The Fifth Circuit's affirmance of the order dismissing the petition for habeas corpus relief based upon the purported unavailability of these letters is indicative of how far the majority had to go to circumvent the clear import of the Chambers holding.

The opinion further misinterprets controlling facts in the Maness case crucial to a just determination of petitioner's claim. The opinion states:

Petitioner offered the rather unrealistic explanation that the baby may have fallen down, gotten caught in her crib, or hit herself in her head with her bottle. 512 F.2d at 92.

While Gary Maness did testify to that effect, the majority ignores the fact that Gary also testified that this was his belief only because this is what his wife had told him as to how the baby had sustained the injuries:

Q. Now, when you say that you told the doctors that the baby hurt itself by hitting itself against the crib, and with the baby bottle, and you said, "that's as far as I know," how do you know that's how it happened?

A. Because Linda told me.

Q. When did she tell you that?

A. When I asked her how she [the baby] got the bruises. (Tr. 317-318).

Thus, Gary's explanation of how the baby sustained these injuries is entirely consistent with the thrust of his defense that he was innocent, and there was reason to believe that his wife's in court testimony was false and impeachable, and that she had, in fact, committed the crime. The letters corroborate this view. The proffered testimony of Dana Maness corroborates this view. Maness' version of the events of the day in question corroborates this view.

Moreover, it is respectfully submitted that the opinion overlooks and misconstrues a controlling point of law in the Maness case in reaching its decision that:

This trial record, our inability to find any positive indicia of the reliability of the hearsay testimony of Ruth and Dana Maness, and the unavailability of the letters for our inspection, leads us to conclude that the voucher rule's application did not deprive Maness of a trial in accord with notions of fundamental fairness embodied in the due process clause. 512 F.2d at 92.

Throughout the opinion, the court characterizes the proffered testimony of Dana and Ruth Maness as hearsay testimony which lacks the reliability and trustworthiness of hearsay testimony in Chambers. This perceived distinction from Chambers is not at all relevant to the instant case, and even if it were relevant, it is based on a fallacious legal premise. This testimony (Dana and Ruth) was sought to be introduced to impeach Linda's in-court testimony. Thus, it is not hearsay at all, as the Fifth Circuit suggests, but rather a category of non-hearsay (not coming in for its truth) and would be acceptable as evidence had it not been excluded based on the Florida Voucher Rule. (See Rule 801.2 of the Federal Rules of Evidence). Thus, the opinion's characterization of Dana and Ruth's testimony as "hearsay testimony" lacking the reliability and trustworthiness of the hearsay testimony wrongfully excluded in Chambers is a fallacious basis upon which to deny this petitioner habeas corpus relief. Moreover, each item of evidence excluded in the Maness case cross-corroborates the others, thereby supplying any requisite "reliability and trustworthiness" that the opinion finds lacking.

It is submitted that the dissenting opinion of Judge Clark in the instant case suggests the constitutionally correct disposition of the petitioner's claim:

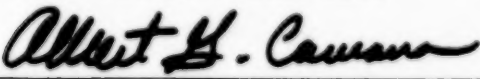
The missing letters from wife Linda, according to our only information as to their content, not only supported Dana's statements, but also substantiated the theory of Gary's defense. Misty received fatal wounds while she was in the custody of Gary or Linda, or both of them. Gary's confession assumes sole responsibility, subject to the implausible possibility of self injury. Linda's letters and Dana's statements intended to cast more than a reasonable doubt that Gary alone was guilty. The letters and testimony were excluded solely because of the Florida Voucher Rule which sanctified Linda's testimony from attack by Gary.

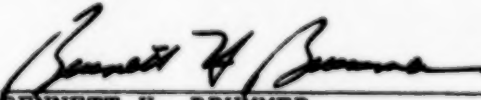
As I perceive the due process principle announced in Chambers, it commands that every material source of evidence as to what was said and done by the principal players in this domestic tragedy should be laid before the triers of fact. At a minimum, it seems to me that this case must be remanded for determination of the authenticity and content of Linda's letters. If these were her letters and read as described, it further is my view that habeas corpus relief should be granted and Florida should be required to retry Gary in a fair proceeding which admits all of the facts in testing for the truth. 512 F.2d at 93.

CONCLUSION

The tragic death of this infant child should not cloud or diminish the petitioner's rights to due process of law guaranteed by the Fourteenth Amendment of the United States Constitution as interpreted by this Court in Chambers v. Mississippi, 410 U.S. 284 (1973). The parallels between the Maness case and the Chambers case are striking. The prejudice suffered by Maness and Chambers should not be subject to artificial distinctions and calculations regarding the degree to which the defendant is thwarted in his effort to effectively present his defense. The opinion concedes prejudice to the petitioner by virtue of the application of the Florida Voucher Rule. The petitioner's efforts to establish a reasonable doubt in the minds of the jury as to his guilt were obviously thwarted. To grant the petitioner a new trial in which the letters of Linda Maness and the testimony of Dana and Ruth accompanied by the cross-examination by the defense of Linda would further the cause of justice and the preservation of basic constitutional liberties. To deny this new trial on fancied distinctions between this cause and the rule of law of this Court as enunciated in Chambers would be to derogate from the standards established by this Court in Chambers and to permit confusion and disharmony to exist among the circuits concerning a fundamental point of constitutional law. Perhaps even more importantly, and on another level, this Court should not allow the door to be closed on an innocent man while his wife escapes the damning implications of her letters and extra-judicial statements.

Respectfully submitted,


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